IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1239 OF 1988

1. Pranlal K. Doshi
2. Dinesh Pranlal Doshi
3. Dilip G. Vartak
4. Vasant G. Vartak
5. Arun G. Vartak
6. M.B. Vartak
7. Laxman B. Vartak

(all Indian inhabitants having their office at Naaz Cinema Building, Lamington Road, Bombay – 400 004.) ...Appellants

V/s.

1.The Municipal Corporation of Greater Bombay.

2. The Municipal Commissioner for Greater Bombay.

3. Shri B.G. Deshmukh, Municipal Corporation for Greater Bombay.

(All having their office at Mahapalika Marg, Fort, Bombay : 400 001.) ...Respondents

Shri.R.M. Nakhawa with Shri.Vasant Dhawan for Appellants.
Shri.R.T. Walawalkar with Mrs. Visha Dabhade for Respondent No.1/ Municipal Corporation.

CORAM : V.M. KANADE, J.

DATED : 31st OCTOBER, 2007.

JUDGMENT:-

1. Heard learned counsel for the Appellants and learned counsel for the Respondent No.1/Municipal Corporation.

2. Appellants are challenging the order passed by the Additional Chief Judge, Small Causes Court, Bombay in Municipal Appeal No.M/14/1978 whereby appeal filed by the Appellants herein challenging rateable value fixed by the Respondents was dismissed and order passed by the Assistant Assessor and Collector dated 23rd February, 1978, fixing rateable value of building which was being used as a theatre at Rs.64,215/- with effect from 1/4/1978.

3. Brief facts in a nutshell are as under:-

Appellants are the owners of cinema theatre known as "Central Cinema" which is situated at Girgaon, Mumbai which came to be assessed for the purpose of levy of property tax under Bombay Municipal Corporation Act, 1988 (hereinafter referred to as the said Act.) under Ward No.'C' at Rs.64,215/- for the assessment year 1978-79. Previously, rateable value of the theatre was Rs.55,100/-. Said theatre was assessed

on the basis of average income received by the owners for the year 1974-1975, 1975-1976, 1976-1977. Average income of one year of Rs.10,000/- being income from slides shown before pictures which were exhibited in the theatre was added to this average income. The total average income was arrived at Rs.9,21,492.50/- . Tax was arrived @ of Rs.7.¼% of the said amount which came to Rs.69,111.00/- under Sec.154(1) of the said Act. 10% of tax is permitted and previous rateable value of stall in theatre premises which was fixed at Rs.2015/- was added to this figure. Accordingly, rateable value of Rs.64,215/- was fixed with effect from 1/4/1978.

4. Being aggrieved by this order passed by the Assistant Assessor and Collector, Appellants preferred an appeal in the Small Causes Court U/s.217(I) of the said Act. Respondents filed extract of Tabulated Ward Report in which figure of Rs.64,215/- which was arrived at, was disclosed. It was stated by the Corporation that they had adopted method known as "Percentage of Gross Takings Method". Appellants in their appeal memo took objection to jurisdiction of the Corporation in following this method. It was contended that rateable value ought to have been determined on the basis of "Profit Method" or the "Accounting

Method". Another objection which was raised by the Appellants herein was that the Respondents did not permit the deductions to the expenditure incurred by the Appellants on account of amounts payable to the distributors for hiring of films which were exhibited in the theatre, maintenance charges of machineries, depreciation, interest on capital, staff salaries, electricity bills etc. and other charges for running the said theatre. Appellants examined two witnesses namely their partner Arun Ganesh Vartak and their accounts clerk Mohomed Zuber Ahmed Chabra. They also produced statements of profit and loss accounts. Respondents examined their Deputy Superintendent Ramakant Toraskar. Appellate Court dismissed the appeal and confirmed the order passed by the Assistant Assessor and Collector. Being aggrieved by the said order, Appellants have preferred this appeal.

5. Shri.Nakhawa, the learned counsel for the Appellants submitted that impugned order dated 23rd February, 1978 passed by the I.O. BMC was not a reasoned order. It was submitted that this ground though was raised in Municipal Appeal before the Small Causes Court, was neither considered nor decided by the Small Causes Court. It was submitted that it was incumbent on the part of the Assistant Assessor and

Collector to have given a reasoned order. In support of said submissions, he relied on the judgment of the Apex Court in the case of **Food Corporation of India V/s. State of Punjab & Ors. reported in 2001(1) SCC 291**. He also relied on the judgment of this Court in the case of **Gopal Chandra Saha & Ors. V/s. Municipal Corporation of Greater Mumbai & Ors. reported in 2004(2) ALL MR 181**. He then submitted that Assistant Assessor and Collector had erred in relying on "Gross Takings Method" and not on the "Profit Method". He submitted that the "Profit Method" was recognized method for assessing property owned by the owner and rateable value on the basis of income accrued from year to year. In support of said submissions, he relied on the judgment of the Apex Court in the case of **Municipal Corporation of Greater Bombay V/s. Royal Western India Turf Club Ltd reported in AIR 1968 SC 425**. He also relied on another judgment of the Apex Court in the case of **East India Commercial Co Pvt. Ltd. V/s. Corporation of Calcutta reported in AIR 1998 SC 1789**. He then relied on the judgment of the Division Bench of this Court in the case of **Kantilal Dharsi Desai V/s. Karmala Nagar Palika & Ors. reported in AIR 2000 BOMBAY 484**. He submitted that if the "Profit Method" is

accepted, then deductions claimed as per statement of accounts for three years would have to be accepted. He further submitted that the Trial Court had failed to take correct figure of average income for the relevant years. He invited my attention to the evidence of AW1 Arun Vartak and figures which were relied upon by the Small Causes Court and as deposed by AW1 Arun Vartak were incorrect and, therefore, there was apparent mistake committed by the Small Causes Court. He further, submitted that the Trial Court committed an error in relying on extract from the book written by the learned author Roshan H. Namavati. He submitted that the Trial Court had relied on this extract without considering full version of Chapter 150 which dealt with provisions of Section 154 of the said Act. He submitted that standard rent principle ought to have been followed while assessing hypothetical rent of the premises owned and occupied by the occupier. In support of said submissions, he relied on the judgment of the Apex Court in the case of **Dr.Balbir Singh & Ors. V/s. M/s.M.C.D & Ors. reported in AIR 1985 SC 339**. He further submitted that theatre in question at the relevant period was not a air conditioned theatre and, therefore, fell in the category of "B Class" of theatre and, therefore, Assistant Assessor and

Collector had erred in adopting 7.¼% deduction in the case of such class of theaters. He further submitted that Small Causes Court had not given proper reasons for accepting 7.¼% as the proper percentage in the case of theater owned by the Appellants. He submitted that in the case of "Sangam Cinema" which was "A Class theatre, Division Bench of this Court had fixed percentage of 5%. He relied on the judgment of Division Bench of this Court in the case of **Municipal Commissioner for Greater Bombay and Anr. V/s. Sangam Cinema reported in 1992 Mh.L.J. 1403**. He then submitted that ratio of the judgment **reported in 1969 Bombay Law reported 461** would be applicable to the facts of the present case and, therefore, matter may be remanded to the Trial Court.

6. Shri.Walawalkar, the learned counsel for the Respondent No.1, on the other hand, relied on the judgment of this Court in the case of **The Globe Theatres Ltd. V/s. The Chief Judge of Small Causes Court reported in 1945, Bom. L.R. 691 Vol.XLVIII**. He submitted that ratio laid down in this case had been followed. He submitted that in this case owners of the property were using property as a building for the business of exhibiting cinema films. He submitted that ratio laid down in this case

in the case of assessment made U/s.154 of the said Act had been followed by subsequent judgments of this Court. He invited my attention to judgment in the case of **Smt. Jankibai Pralhadrai Brijlal Sakseria V/s. Shri.J.B.D'Souza, Municipal Commissioner Greater Bombay & Anr., Appeal No.858 of 1971 from Original Decree delivered by Justice Vaidya, J. of this Court dated 17th June, 1978** wherein ratio laid down in **Globe Theatres Ltd. V/s. The Chief Judge of Small Causes Court (supra)** was followed. He also invited my attention to the judgment in the case of **Municipal Commissioner for Greater Bombay and Anr. V/s. Sangam Cinema(supra)**. He further submitted that Assistant Assessor and Collector was justified in making deductions @ of Rs.7.¼% of the "Gross Takings Method". He invited my attention to cross examination of AW1 Arun Vartak wherein he had admitted that Appellants are owners of other five theatres in the same area and this was the same percentage of deductions which was adopted by the Corporation in respect of said theatres. He also invited my attention to the extract from Namavati's book of valuation. He further submitted that Section 6 was specifically in respect of rateable value of Cinemas. He submitted that the Small Causes Court was justified in confirming

percentage @ of Rs.7.¼%. He further submitted that deductions were only applicable in cases where the percentage method was followed. It is submitted that discretion as to which method should be made applicable for assessing property was solely with the Corporation. In support of said submissions, he relied on the judgment of the Apex Court and Division Bench of this Court on which reliance was placed by the learned counsel for the Appellants. He further submitted that judgments on which reliance was placed by the Appellants could not be taken into consideration and "Profit Method", therefore, would not be applicable in this case. He further submitted that orders which were passed by the Assistant Assessor and Collector were essentially administrative orders and that valuation in respect of property had to be done almost every six months and, therefore, it could not be expected that the Assessor should give personal hearing to the owner of the property and that the remedy was available to the owners of the property by filing an appeal in the Small Causes Court. He relied on the judgment of the Apex Court in the case of **Municipal Corporation of Brihanmumbai & Anr. V/s. State Bank of India reported in (1999)1 SCC 123**.

7. I have heard learned counsel for the Appellants and learned counsel for the Respondent No.1 at length. Questions which fall my consideration in this case are:-

> 1) Whether the Corporation was justified in adopting "Gross Takings Method" in stead of "Profit Method" in respect of property which was owned by the owner wherein he himself has conducted business of exhibiting films in the said theatre?
>
> 2) Whether the Small Causes Court was justified in accepting the assessment arrived at by the Assistant Assessor and Collector?

8. So far as first question is concerned, it has to be noted that there are number of methods for arriving at a rateable value such as i) Direct Rental Evidence, ii) Rental Evidence Based on Comparables, iii) Contractor's Test or Standard Rent Theory, iv) Profit Method Or Accounting Method and v) Percentage of Gross Takings, a variant of Account Method. The Apex Court in the case of **Municipal Corporation of Greater Bombay V/s. Royal Western India Turf Club Ltd (supra)** and Division Bench of this Court in the case of **Kantilal Dharsi Desai V/s. Karmala Nagar Palika & Ors.(supra)** have held that discretion was

vested with the Corporation to decide which method should be followed for the purpose of assessing rateable value of the property and what was essential was different method to be followed. The rateable value which was arrived at was required to be fair and impartial. Submissions made by the learned counsel for the Appellants, therefore, that "Profit Method" ought to have been adopted by the Corporation, cannot be accepted. Ratio of the judgments on which reliance has been placed by the Appellants that "Profit Method" should be adopted, therefore, will not be applicable to the facts of the present case. The Division Bench of this Court in **Kantilal Dharsi Desai V/s. Karmala Nagar Palika & Ors. (supra)** has observed in Para 19 as under:-

> "19. Thus, in the facts and circumstances of the case, we set aside the determination of the rateable value in respect of the premises in question which have been used for the purpose of conducting petrol pumps, in respect of which, as stated earlier, the rateable value was determined on the basis of the profit method. We do not interfere with the determination of the rateable value in so far as the other properties are concerned and leave the petitioners to pursue their remedies in appeal. We, however, make it clear that we are not deciding as to what method the Municipal Council may adopt for

> determining rateable value since this is a matter which has to be decided by the Municipal Council. Our judgment should not be construed as requiring the Municipal Council to compute the ratable values of the properties used for running petrol pumps on the basis of the profit method. We have clarified in our judgment the basis on which the profit method is to be applied, should the Municipal Council decide to fix rateable value on the basis of the profit method. It would be open to the Municipal Councils in this case to reflex the rateable value of the properties in question which had been used for the purpose of conducting petrol pumps, in accordance with law."

9. So far as the second submission is concerned, there is nothing on record to indicate that hearing was not given to the Appellants while assessing ratable value. Fact remains that, thereafter, appeal was preferred by the Appellants U/s.217(I) of the said Act and though it is termed as an appeal, in fact, at this stage Appellants are permitted to raise all objections and it is treated as a full fledged trial since Appellants are permitted to lead evidence in respect of their objections. The Corporation is also permitted to lead evidence in respect of their case. Submissions of learned counsel for the Appellants that no hearing was

given to the Appellants by the Assistant Assessor and Collector and said order was liable to be set aside on that account, cannot be accepted. Appellants had liberty to lead evidence in the Appeal. Appellants have statutory right to challenge order of assessment by filing an appeal which is treated as if it is a suit for trial. Objection, therefore, that no hearing was given, cannot be accepted at this stage. Submission of learned counsel for the Appellants that Corporation had erred in arriving at percentage of Rs.7.¼%, as correct percentage, was to be arrived at on the rateable value, also cannot be accepted. Trial Court has confirmed order of the Assistant Assessor and Collector after having taken into consideration various aspects that AW1 Arun Vartak admitted in cross examination that Appellants owned five theatres in the same area and that in respect of these theatres Rs.7.5% is fixed for making deductions from the average annual income. It is no doubt true that theatre is a non-air conditioned theatre. However, that alone cannot be a criteria for the purpose of arriving at the proper tax payable by the Appellants. In the case of **Municipal Commissioner for Greater Bombay and Anr. V/s. Sangam Cinema(supra)**, Division Bench of this Court has taken into consideration various aspects which have been considered while fixing

percentage. In that case, Division Bench has fixed percentage of 5% and that it was an air-conditioned theatre. Yet, said Sangam Cinema, admittedly was situated at Andheri which is far away from the Central City. Under these circumstances, therefore, merely because said theatre was an air-conditioned theatre and 5% was fixed by the Division Bench, same percentage cannot be made applicable to the Central Cinema owned by the Appellants. The ratio of the said judgment will not apply to the facts of the present case.

10. It is no doubt true that there is some factual error committed by the Trial Court. Appellants' witness had given figures in his evidence and figures which are relied upon by the Small Causes Court are incorrect so far as year 1976-77 is concerned. To that extent, submissions made by the Appellants will have to be accepted. There is difference of almost Rs.20,000/- in the said calculation if the correct calculation is made and to that extent rateable value as fixed by the Assistant Assessor and Collector and Small Causes Court will have to be corrected. Appellants are entitled to lead evidence U/s.217 of said Act and the said appeal is treated as if it is a suit. At the same time appeal preferred against such order in this Court may not be treated as first appeal in the strict sense of

term. The Apex Court in the case of **Municipal Corporation of Brihanmumbai & Anr. V/s. State Bank of India(supra)** has observed as under:-

> "10. This section has been introduced to minimise the delay in the finality of a decision. Prior to the enactment of the above provision, under the letters patent, an appeal against the decision of a Single Judge in a second appeal was, in certain cases, held competent, though under Section 100 of Code of Civil Procedure, there was some inhibition against interference with the findings of fact. The right of taking recourse to such an appeal has now been taken away by Section 100-A of the Code of Civil Procedure(supra). Since, an appeal under Section 217(1) of the Act is a first appeal in a second forum/court and an appeal under Section 218-D of the Act is the second appeal in the third forum/court, no further appeal would be competent before the fourth forum/court in view of Section 100-A of the Code of Civil Procedure(supra)"

11. It is no doubt true that said observations were made in respect of maintainability of letters patent appeal against judgment of the High Court U/s.218-D of the said Act. Yet, fact remains that first appeal which

is filed in this court is essentially an appeal before 3rd Court and, therefore, if two views are possible and Small Causes Court has accepted the view taken by the Assistant Assessor and Collector, then the High Court U/s.218-D of the said Act cannot interfere with said view.

12. This Court in the case of **Globe Theatres Ltd. V/s. The Chief Judge of Small Causes Court (supra)** has considered merits of the phrase "Annual Letting Value" and that, more particularly, in the context of cinema theatre which is run by the owners of the building. In the said case also this Court also held that 7.5% was correct percentage adopted by the Corporation in respect of Cinema theatres. This ratio of this judgment has been followed in several subsequent judgments. In my view, there is no reason to take a different view, and therefore, Corporation, in my view, was justified in facts of the present case in adopting "Gross Takings Method". In the case of **Municipal Corporation of Greater Bombay V/s. Royal Western India Turf Club Ltd (supra)** "Profit Takings Method" was adopted by the Corporation. However, it has to be noted that it was a Race Club and that Corporation had chosen to follow "Profit Method" in the said case. In the case of **Kantilal Dharsi**

Desai V/s. Karmala Nagar Palika & Ors.(supra) "Profit Takings Method" was followed. However, property in question was being used as Petrol Pump. Under these circumstances, ratio of these judgments will not apply to the facts of the present case. Ratio of the judgment in the case of **Dr.Balbir Singh & Ors. V/s. M/s.M.C.D & Ors.(supra)** also will not apply to the facts of the present case. In the said case hypothetical rent was taken into consideration and it was held that hypothetical rent could not be more than standard rent as laid down in Rent Act. In the present case Corporation is justified in adopting "Gross Takings Method and in such case calculation of hypothetical rent vis-a-vis standard rent will not apply. Ratio of this judgment will not apply to the facts of the present case. Ratio of the judgment in the case of **Filmistan Private Limited V/s. The Municipal Commissioner for Greater Bombay reported in 1969 Bombay Law Reporter page 461** will not apply to the facts and circumstances of the present case. Small Causes Court had not taken into consideration certain important aspects and, more particularly, standard rent. Under these circumstances, Division Bench of this Court remanded the matter back to the Trial Court. However, in the present case, in my view, Small Causes Court has considered all the

objections raised by the Appellants and, therefore, no case is made out for remanding back the matter. Submissions made by the learned counsel for the Appellants, therefore, cannot be accepted. Under these circumstances, Appeal is partly allowed. Annual average income, therefore, be determined on the basis of average of three years of gross annual income. Thereafter, income of Rs.10,000/- from slides shall be added and ratable value of 7.¼ of this amount to be calculated. On this amount, deduction of 10% may be given and the final figure would then be the ratable value of the cinema theatre.

. Appeal is partly allowed in the above terms and disposed of accordingly.

V.M. KANADE, J.